IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1182

LOUIS N. ROSENBAUM,

Petitioner,

against

FREDERICK BROWN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALFRED A. COOK,
KENNETH E. WALSER,
HENRY COHEN,
Counsel for Respondent.

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AGAINST

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BRIEF FOR RESPONDENT

This Court will not find quoted in the petitioner's argument (pp. 8-24) the words of the statute which petitioner urges was improperly interpreted in the courts below (12 U. S. C. sec. 64). The omission is significant, for the exact language of the statute refutes petitioner's claims.

The statute, section 64, imposes liability for assessment upon any stockholder of a national bank within sixty days before its "failure * * * to meet its obligations". Chief Judge Lehman has held for a unanimous Court of Appeals of New York that the "failure" of the Harriman National Bank "to meet its obligations" occurred at the end of the banking holiday on March 13, 1933,—some days after petitioner bought his shares. March 13 was the day on which the banks of New York resumed business but the Harriman Bank was not permitted to open. It then follows upon

elementary common law principles involving no federal question that petitioner should reimburse respondent's assignor, who was required to pay the assessment upon the shares although petitioner was the owner of the shares when the bank failed.

Petitioner asserts (p. 7) that interpretation of section 64 is of general importance in view of the number of bank failures in 1933, and in "the future administration" of the statute. But (putting aside the settled interpretation of section 64 in its application to the banking holiday of March 1933—see pp. 7-9, *infra*) nearly a decade has passed since the banking holiday; and need for administration of the law cannot arise in the future unless, notwithstanding legislation now existing, we can conceive of another national banking moratorium.

The Facts

Blumenthal, the respondent's assignor, was the owner of record of shares of Harriman National Bank stock within 60 days before its failure (fol. 177). On March 6, 1933, during the national banking holiday, the petitioner, Rosenbaum, bought some of them from an intermediate owner (fols. 134-155; 691 *et seq.*, 136 *et seq.*, exh. 29, fol. 1219), and the shares with respect to which he has been held liable in the present action were delivered to him during the holiday.

The Governor of the State of New York had proclaimed a holiday for all the banks of the State on March 3, 1933 (fol. 1057). Until that day, the Harriman Bank had done a general banking business without any restrictions whatever (fol 160). Indeed, during the holiday, the Harriman Bank paid out, under Treasury regulations (fols. 1084-1116; 1129-1144) against funds on deposit with it, for the payrolls of its customers and other emergencies of its depositors, approximately a half million dollars (fols. 163-5, 194). Thus petitioner's implication (petition, p. 9) that

the Bank closed on March 3 for "hopeless insolvency" is without basis in the facts.

There was even no suspicion that the bank would not open upon termination of the holiday (fols. 785-8, 844, 849). The Harriman Bank was one of the banks of the New York Clearing House Association (fol. 845). It does not appear that its own officers had any inkling that it would not open (fols. 165-6, 791, 171-2). Neither did the public—or the petitioner would not have purchased his shares (exhs. 3, 3-A, 3-B, pp. 337-9; cf. fols. 852-3).

When the holiday ended on March 13 (fol. 163), the other banks in New York City were permitted by the Treasury Department to open. Only at that time, as the result of an examination of its assets and following repudiation of a pledge to support it which had been made by the New York Clearing House Association (see *O'Connor* v. *Bankers Trust Co., et al.*, 159 Misc. 920, at 925-8, aff'd. 253 App. Div. 714, aff'd. 278 N. Y. 649), was the Harriman Bank denied such permission. Only then was a Conservator appointed for it (fols. 92, 165-6, 178, 1018).

Petitioner states (p. 4) that the Comptroller of the Currency levied his assessment only upon those persons who were shareholders within 60 days of March 3, but this is not the fact. Neither the Comptroller (nor the "Treasury Department"—brief for pet. pp. 11, 14) ever limited the assessment to stockholders on or before March 3 (see fol. 1030). In fact the Receiver of the bank sent notices of assessment both to petitioner and to respondent's assignor (fols. 93, 1036-1050).

History of the Litigation

The first trial of the action resulted in a judgment for the respondent requiring petitioner to reimburse him for the assessment paid by the respondent's assignor (opinion of Mr. Justice Steuer, New York Law Journal, October 17, 1939). But because of a misunderstanding of counsel con-

cerning their stipulation of the facts, the Appellate Division of the State of New York reversed the judgment and ordered a new trial (259 App. Div. 304). The petitioner had a judgment at the second trial which, however, the Appellate Division reversed—four judges concurring and one dissenting (262 App. Div. 136). The New York Court of Appeals unanimously affirmed the ensuing judgment in favor of the respondent (287 N. Y. 510).

Questions Involved

The opinion of Chief Judge Lehman of the Court of Appeals succinctly sets forth the questions involved—in their exact relation to the language of the statute (p. 461):

> "Two questions of law remain, which must be decided upon this appeal:
>
> *First:* Was the date of the bank's failure 'to meet its obligations', at which time the statutory liability of stockholders attached, March 3, 1933, before the defendant purchased his stock, or March 13, after the stock was delivered to defendant?
>
> *Second:* May a stockholder who has transferred his stock within sixty days before the date of the failure of the bank to meet its obligations and who, for that reason, has been compelled to pay a judgment recovered against him in an action brought to enforce the statutory liability imposed on stockholders of banking associations, maintain an action for reimbursement against the stockholder who had become the owner of the stock at the date of such failure through delivery from persons to whom it had been previously transferred?"

As to the first question, the opinion points out (pp. 461-2) that the statute fixes the liability of the stockholders of a national bank as of "the date of the failure of such association to meet its obligations", and not any other date when the bank was or might have been insolvent and which

time the rights of creditors became fixed. And the opinion holds that failure of the Harriman Bank to meet its obligations first occurred at the end of the banking holiday when the other banks opened for business and a Conservator was appointed for the Harriman Bank (see pp. 6-7, *infra*).

The second question does not even appear to present any issue for this Court. As indeed the petitioner points out (br. pp. 25-6)—section 64 does not purport to fix who, of the many persons possibly subject to assessment, should be primarily liable, or to dictate whether the petitioner, the owner of the shares at the failure of the bank, should reimburse the respondent's assignor. The answer depends upon common law principles and not upon section 64. So Chief Judge Lehman pointed out (pp. 463-4):

> "When the statutory liability of 'subsequent transferee' is extinguished by the payment made by the stockholder who had transferred his stock, no right of action for the failure of the transferee to meet such liability is created *by the statute* in favor of the stockholder who made the transfer. Recourse, if any, against the transferee must be by common law action. Here the plaintiff asserts a right of action based on a contract implied in law for moneys which his assignor was compelled to pay though it was the duty primarily of the defendant to make the payment" (emphasis in original).

POINT I.

The "Failure" of the Harriman Bank "to Meet its Obligations" occurred on March 13, 1933, when a Conservator was appointed.

Under Section 64 only the date of the "failure" of the bank "to meet its obligations" is determinative of petitioner's liability to assessment. This is the complete answer to petitioner's contention that the insolvency of the Harri-

man Bank at the beginning of the bank holiday on March 3 constitutes its "failure". The opinions in the present case have made this clear. The Appellate Division stated (p. 453):

> "The language of the statute fixes the end of the period as being '*the date of the failure of such association to meet its obligations*'. The Bank never failed to meet any of its obligations until the appointment of a conservator on March 13th. During the period of the bank holiday, it functioned within the restrictions imposed by the Treasury Department, it met all the obligations which it was permitted to meet and its status was no different from any other national bank which later reopened under federal license. * * * The language of the proclamations creating the bank holiday negatives the idea that the closing of the banks was caused by their failure to meet their obligations. The reason assigned in the proclamations was the unprecedented withdrawal of money from the banks and subsequent speculation in foreign exchange, as well as hoarding." (Emphasis in original.)

And in the Court of Appeals (pp. 462-3):

> "Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations'. The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always.
>
> * * * * *
>
> When, however, by proclamation of the President and Governor, made pursuant to authority vested in them, the date upon which banking obligations became

due and may be paid is postponed, there is, as we have already pointed out, no 'failure' by any bank 'to meet its obligations.' That is the case here. The date of such failure arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction."

The Authorities

The authorities are unanimous. The leading case is *Pyne* v. *Jackman*, 12 Fed. Supp. 653 (1934)—the first rendered after the end of the Banking Holiday. The defendant had sold his shares in the Pelham National Bank within sixty days before the beginning of the holiday in New York but more than sixty days before the conclusion of the holiday. It was held that he was not liable for the assessment. The opinion (Goddard, J.) rejects petitioner's argument that March 3 is the determinative date (p. 655):

> "It does not seem to me that March 4 can be assumed as the date when the bank failed 'to meet its obligations' as contemplated by Section 64 of the statute. It was closed then by a general proclamation closing all banks; not because it had failed to meet its obligations. The fact is that right up to the time the * * * Bank, as well as all other banks, were closed by the President's proclamation, it was meeting its obligations. * * *
>
> "I think it could hardly be suggested that when the banks throughout the country closed on March 4 pursuant to the general proclamations, that there was such failure to meet their obligations as to hold the stockholders of the national banks liable under section 64 on the ground that the banks had failed to meet their respective obligations."

Petitioner does not fairly state this case (br. pp. 16-17). Plaintiff there was not given leave to plead over merely in order that he might allege the insolvency of the bank. On the contrary, Judge Goddard explicitly held that

whether or not the bank was insolvent when the holiday began was irrelevant.* No amended complaint was ever served, and although the plaintiff there took an appeal from the judgment dismissing the complaint, he later withdrew it.

There are other expressions of the same views:

Schram v. *Clair*, 28 Fed. Supp. 422 (1939): Judge Galston—"such closings of the bank under the holiday proclamations do not fix the date of the failure of the bank to meet its obligations" (p. 424).

Goess v. *Hoit* (an unreported opinion in the Southern District of New York in June 1938): Judge Clancy—

> "it is difficult to see how the closing of the (Harriman) bank on March 4, could establish the date for determining the sixty day period for liability of shareholders under section 64".

Ward v. *Simon*, 23 Fed. Supp. 117 (1938): Judge Dickinson found as a fact that the date of the failure of a bank exactly in the position of the Harriman Bank was March 14 (cf. also, *Munro* v. *Post*, 23 Fed. Supp. 308—E. D. N. Y. 1938).

Sadlier v. *Lay*, 222 Wis. 641, 643-4 (1936):

> "The mere declaration of a bank holiday by the President of the United States in response to a national emergency could not be taken as the date 'of the failure of such association to meet its obligations.' The proclamation applied to all banks and prohibited not

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* "There is a genuine difference between the 'date of insolvency' and 'date of the failure of such association to meet its obligations', which is the wording of section 64 * * *. The Congress in the National Banking Act has clearly indicated in sections 91, 161, 191 and 481, title 12 U. S. C. A. that it recognizes the distinction between the insolvency of a bank and failure to meet its obligations, and that they are quite different things. * * * many banks which have not failed to meet their obligations were temporarily insolvent" (12 Fed. Supp., at pp. 655-6).

> merely the payment but the presenting of claims, and was open to no inference applicable to a particular bank that that bank was unable to meet its obligations. Solvent or insolvent, it was prohibited from meeting its obligations. * * * The bank in question never secured such a license and, as heretofore stated, a conservator was appointed for it * * * and the time of appointment fixes the 'date' for the purpose of the sixty day statute."

Goess v. *Myers*, 134 Pa. Super. 272, 4 Atl. (2) 184, 1939 (a suit upon an assessment on shares of the Harriman Bank):

> "These cases are ample authority to justify the conclusion that on March 13, 1933, the day the Comptroller concluded the bank was unable to carry on its ordinary business and appointed a conservator there was a failure on the part of the bank to meet its obligations, within the provisions of the statute". (p. 276).

The Nature of the Banking Holiday

Petitioner would imply that the Harriman Bank failed when the holiday began. But since normal banking activity of all banks was suspended on that day, no inference as to the inability of any bank to carry on its normal business could fairly be or have been drawn. Equally would the closing of a bank on Christmas day, or for the full week-end during the summer months, imply its failure. In fact during the holiday the bank met all demands which could legally be made upon it (pp. 2-3, *supra*).

The Comptroller did not, when the holiday began, in fact or in theory take the Harriman Bank or any bank "in charge through an examiner" (br. for pet., pp. 9, 11). There was a holiday, and not a taking over of the assets of the Banks of the country. The reason for the banking holiday was, as expressly stated in the proclamation, "the unprecedented withdrawal of money from the banks and subsequent speculation in foreign exchange, as well as

hoarding" (fols. 1371, 1060-1). It is not the fact, as petitioner asserts (p. 10), that any "continuous conservation of assets was intended".

Only if one assumes that every national bank in the country failed to meet its obligations on March 3, the inception of the holiday, could that day be considered as the date when the 60-day period ended. Even defendant avoids suggesting such a consequence (p. 461). But the Harriman bank functioned precisely as all banks did during the holiday. The distinguishing circumstance did not occur until the bank failed to open its doors when the holiday terminated. Only then was there any "failure" on its part "to meet its obligations".

Petitioner's Contentions

1. *Petitioner's Point II, p. 11.* Petitioner's contention that the "Treasury Department" fixed upon March 3 as the date terminating the 60-day period is based solely on the fact that the receiver of the Harriman Bank first sent notices of assessment to persons who were stockholders of record within the 60-day period before that day. But the receiver also attempted to collect the assessment from the petitioner, who was not a stockholder until after March 3, and, indeed sued him and demanded summary judgment against him. The simple truth is that the Comptroller merely assessed the "shareholders" of the Bank without fixing a date (fol. 1033)—and defendant's argument is merely based on an initial informal ruling of the receiver designed to permit claims against a larger list, which ruling the receiver later modified with equal informality.

Petitioner's pretense (pp. 29-30) that here was a ruling either by the Treasury or the Comptroller should deceive no one.

2. *Petitioner's Point III, p. 14.* Petitioner's reliance upon the Comptroller's ruling as to the date of *insolvency*,

contained in the Circular CR-7 (fols. 1262, 1264), rests upon a misconception which the opinions in this case have sought to dispel. The ruling does not even purport to apply to stockholders (trial court, at fol. 1307; Appellate Division, at fol. 1374). As Judge Goddard stated in *Pyne* v. *Jackman* (*supra*, p. 7):

> "I do not think this could or was intended to be a judicial determination of or to affect the legal status of a stockholder under Section 64, but was intended as merely the date as of which the rights of the depositors of such a bank were to be adjusted" (12 Fed. Supp. at p. 656).

Nor could this ruling effectively fix the rights of stockholders, assuming that it intended to do so. The question as to who are the persons subject to assessment is a judicial question, and not within the class of administrative matters entrusted to the Comptroller. He "did not and could not fix a date different from that fixed by the statute" (fols. 1374-5).

The authorities to which petitioner points (br. p. 13) hold that the Comptroller has discretion to determine whether a banking association should be closed upon allegation of insolvency. Plainly that is an administrative matter and quite different. The opinion of Chief Judge Lehman on this point, page 463, is conclusive.

3. *Petitioner's Point IV, p. 17: Yonkers* v. *Downey*, 309 U. S. 590. Petitioner's insistence upon this authority fully illustrates his fundamental confusion. This court was concerned in that case with the single question whether a transfer made during the banking holiday of assets of a national bank was a preferential transfer under the National Banking Act, sec. 91. In view of the language of section 91, there was only one question: was the bank *insolvent* when the transfer was made? The liability of the stockholders under section 64 of the National Banking Act,

turning upon the date of the "failure" of the institution "to meet its obligations", was not before the Court. The very quotation from the opinion in the District Court to which petitioner calls attention (br., p. 18) emphasizes that only the issue of creditors' rights was involved.

4. *Petitioner's Point V, p. 19.* Petitioner's other authorities fall into three groups.

(a) The "cases involving the Harriman Bank" (p. 19) do not appear to have any bearing on the date of its failure to meet its obligations. The statement in *Oppenheimer* v. *Harriman National Bank & Trust Co.*, 301 U. S. 206, 207 (br., p. 19), that on March 3 the bank was "unable to meet current demands" was of course inadvertent, as counsel must appreciate. The entire present record contradicts it—the Harriman Bank closed because of the holiday and for no other reason (pp. 2-3, *supra*).

(b) The "stock assessment cases", cited at p. 20 of petitioner's brief, do not present the facts of the present case. In each of the decisions the bank involved had been on a "restricted" basis *before the holiday began.* Of course such a bank "failed to meet its obligations" at the very moment when those restrictions were imposed, and an assessment was properly levied as of that time. But that was not the situation of the Harriman Bank, which did its normal business up to the holiday.

The opinion in the Court of Appeals takes note of these authorities and fully disposes of them (p. 463).

(c) The "many other cases" (brief, pp. 21-2) claimed to establish the date when the banking holiday began as determinative of the 60-day period, are without exception decided under Banking Law section 91, which forbids all preferential transfers after insolvency (and not "failure * * * to meet its obligations"). They hold that a bank which did not open after the holiday must be deemed to have been insolvent at the beginning of the holiday. In this way they

invalidate transfers made during the holiday of the assets of any bank which did not open after the holiday. They do not touch upon any issues involving the liability of stockholders in national banks.

Petitioner's Point VI, p. 22. Petitioner concludes with the contention that "assessment cases *are* insolvency cases" (p. 24)—that is, that the courts below should have identified the date of insolvency (affecting the rights of creditors only) with the date of "failure * * * to meet its obligations" (affecting the liabilities of stockholders). There is neither basis for this claim nor any authority. It does not square with the language of the statute or with its purpose, but rests upon wilful confusion.

POINT II.

The primary Obligation to Meet the Assessment was properly Placed as a matter of General Law upon the Petitioner.

The simple principle applied in placing the ultimate liability for the assessment upon the petitioner was that, since the petitioner was the owner of the shares when the bank failed and so was entitled to any of the benefits accruing upon the shares, he rather than any previous owner should in all fairness also bear their burdens.

The underlying general principle, obvious enough, is laid down in the Restatement of the Law of Restitution (sec. 76) and in a great many other authorities (e. g., *Leake on Contracts*, p. 41; *Commercial National Bank* v. *Sloman*, 121 App. Div. 874, at 877; *Maule* v. *Garrett*, L. R. 7 Exch. 101, per Willes, J.). It has been specifically relied upon where the primary liability for an assessment upon bank shares has been in question (see *Brinkley, Exr.* v. *Hambleton & Co.*, 67 Md. 169, at 178-9); further, the view has several times been expressed that under section 64 the

primary liability rests upon the owner of the shares at the time of the bank's failure (*Laurent* v. *Anderson*, 70 F. (2d) 819 at 823 (C. C. A. 6); *Ward* v. *Simon*, 23 Fed. Supp. 117 at 119; cf. *Way* v. *Mooers*, 135 Minn. 339, *Poston* v. *Hull*, 75 Oh. St. 502 at 507—see record herein, p. 456).

Indeed this Court stated in this connection in *Early* v. *Richardson*, 280 U. S. 496 at 498 that

> "it would be in disregard of all equitable principles to continue against a seller the burdens of ownership after the purchaser had become entitled to all the benefits including the receipt of dividends".

It also seems clear that the issue presents no federal question. Whether or not petitioner was equitably bound, in the absence of contract or privity of estate, to make reimbursement to the respondent whose assignor had paid the assessment in petitioner's behalf, is a question of general State law. The opinion of the Court of Appeals does, of course, make reference to section 64, which, it observes, indicates the intention of Congress that petitioner should bear the primary liability for the assessment (p. 466). But the statute only recognizes and does not create his liability to the respondent, which is rather created at common law. The question whether he is bound to reimburse respondent's assignor who was not the holder of record of the shares—argued at length below (pp. 464-7)—is wholly a common law question and does not arise under section 64. The opinion of Chief Judge Lehman, already quoted (p. 5), points this out clearly.

CONCLUSION

The petition for a writ of certiorari should be denied.

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